In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 582

CONTINENTAL CASUALTY COMPANY

AND

FIDELITY AND CASUALTY COMPANY OF NEW YORK,

APPELLANTS

v.

THE ROBERTSON LUMBER COMPANY

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

MEMORANDUM FOR THE UNITED STATES

By order of the Court entered on January 20, 1969, the Solicitor General was invited to express the views of the United States with respect to this case. As stated below, we believe that the decision of the North Dakota Supreme Court is in part erroneous and, in another part, in conflict with decisions of federal courts of appeals. Nonetheless, we do not think that the instant case raises federal questions of sufficient prospective significance to warrant plenary consideration by this Court.

336-341—69

1. In 1960, appellee Robertson Lumber Company supplied materials for use in the construction, at Grand Forks Air Force Base in North Dakota, of military housing under the program authorized by the Capehart Housing Act (42 U.S.C. 1594 *et seq.*). Progressive Contractors, Inc., the prime contractor for that construction project, furnished a payment bond, as required by 42 U.S.C. 1594(a),[1] on which appellants Continental Casualty Company and Fidelity and Casualty Company of New York were the sureties.

That bond, in standard form, provided (J.S. 85–88) that no suit could be commenced thereon by a materialman unless the materialman, within 90 days after the date on which the last of the materials were furnished, gave notice of his claim to any two of 1) the prime contractor; 2) either the mortgagor-builder or the lender financing the project; or 3) the sureties.[2] Within 90 days of its furnishing of materials, Robertson gave notice of the non-payment of its claim, but only to the prime contractor. Several months thereafter, Robertson gave the dual notice required by the terms of the bond in an untimely fashion, and then instituted this action in a

[1] The Miller Act (40 U.S.C. 270a) requires a contractor engaged in the construction of any public work to furnish a payment bond of a specified nature. Materialmen are granted, by 40 U.S.C. 270b, a cause of action on such a bond, maintainable only in federal court. The Capehart Act (42 U.S.C. 1594(a)) provides that the furnishing of a bond thereunder "shall be deemed a sufficient compliance with the provisions of section 270a of Title 40."

[2] In contrast, the Miller Act requires, as a condition to suit on the payment bonds required by that Act, only that notice be given to the prime contractor (40 U.S.C. 270b(a)).

State court against the prime contractor and the sureties on the bond.[3] The sureties defended on the grounds, *inter alia,* (1) that the State courts lacked jurisdiction over Capehart Act bond actions for the reason that the provision of the Miller Act limiting jurisdiction over suits on public works bonds to the federal courts (see note 1, *supra*) was applicable to such suits; and (2) that the materialman's failure to comply with the notice provision of the bond precluded a suit thereon.

The State trial court held for Robertson (J.S. 89–95),[4] and the North Dakota Supreme Court affirmed (J.S. 17–50; 160 N.W. 2d 61). Relying on a number of State court rulings and the decision of the Tenth Circuit in *United States* v. *Harrison & Grimshaw Const. Co.,* 305 F. 2d 363, certiorari denied, 371 U.S. 920, it held that Capehart Act bond actions may be brought in State courts (J.S. 23–38). In so ruling, it rejected the sureties' assertion, which was supported by *Koppers Co.* v. *Continental Casualty Co.,* 337 F. 2d 499 (C.A. 8) and *Lasley* v. *United States,* 285 F. 2d 98, 100 (C.A. 5), that, by virtue of the Miller Act (40 U.S.C. 270b), exclusive jurisdiction over Capehart Act bond actions was vested in the

[3] Robertson had previously instituted an action in a federal court to recover on the bond, under the Miller Act, asserting that it had complied with the notice provision of that Act (see notes 1 and 2, *supra*). The Eighth Circuit eventually dismissed that complaint on the ground that the notice provision in the Miller Act did not apply to Capehart Act bonds. *Continental Casualty Co.* v. *United States,* 305 F. 2d 794 (see J.S. 101–111), certiorari denied, 371 U.S. 922.

[4] Prior to that decision, the action had been removed to federal court and then remanded back to the State court on the ground the removal was procedurally defective (see J.S. 70–71, 75–81).

federal courts. Additionally, the court concluded that Robertson's failure to give the dual notice required by the bond in a timely fashion did not, under North Dakota law, exonerate the sureties (J.S. 45–50).[5]

2. By their plain terms, Capehart Act payment bonds, which were designed by the Department of Defense, purport to prohibit suits thereon unless there has been compliance with the notice provision they contain. The consistent result under the comparable notice provision of the Miller Act (40 U.S.C. 270b(a)) has been to bar suits where there has been a failure to give the prescribed notice. See, *e.g.*, *Cooley* v. *Barten & Wood, Inc.*, 249 F. 2d 912, 914 (C.A. 1); *Bowden* v. *United States*, 239 F. 2d 572, 578 (C.A. 9), certiorari denied, 353 U.S. 957; see also *Fleisher Eng. & Const. Co.* v. *United States*, 311 U.S. 15, 18–19. The holding of the court below that a suit on a Capehart Act bond was not precluded by the failure of the materialman to comply with the bond's notice provision thus raises a federal question which might well merit plenary review. In addition, the decision below, as noted previously (*supra*, p. 3), is in conflict with decisions of courts of appeals (which are not consistent among themselves) on the issue whether State courts have jurisdiction to entertain Capehart Act bond actions.

Whatever may be said of the decision below on these issues, however, we do not believe that there is any significant need for this Court to examine them. Although there may be a number of Capehart Act bond suits still pending, the authorization of new Capehart

[5] The court also rejected a res judicata defense advanced by the sureties (J.S. 39–45; see note 3, *supra*).

housing projects was discontinued in 1962 and, for all practical purposes, the Capehart housing laws are a dead letter.[6] Accordingly, the federal questions raised by this case do not appear to be of prospective importance. While it is true that, unlike the Capehart Act, the Miller Act is of continuing vitality, it is unlikely that the decision below will have any future impact upon cases arising under that Act. This is because suits on Miller Act bonds unquestionably must be brought in the federal courts (40 U.S.C. 270b(b)), and, as previously noted, the federal courts have uniformly held that there must be strict compliance with the notice provisions contained in that statute.

Accordingly, the United States does not believe that this matter calls for plenary review by this Court, and suggests that it would be appropriate to dismiss the instant appeal for want of a substantial federal question.[7]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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[6] A necessary element of the program, *i.e.*, the Federal Housing Administration's authority to issue commitments to insure Capehart project mortgages, was eliminated, effective October 1, 1962, by P.L. 87–57, Sec. 607, 75 Stat. 111. See 12 U.S.C. 1748b. Moreover, P.L. 87–554, Sec. 507, 76 Stat. 240, provided that after December 31, 1962, no funds for the construction of Capehart housing could be appropriated unless the legislation authorizing such appropriations was enacted after that date. No such legislation has been enacted, and we are advised that the Department of Defense is not urging its enactment.

[7] Alternatively, should the Court conclude that its appellate jurisdiction is not properly invoked here, it would seem that, treating appellants' paper as a certiorari petition (28 U.S.C. 2103), the appeal should be dismissed and certiorari denied.

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